June 29th, 1747.

ADDITIONAL ANSWERS

FOR

Sir *William Cockburn* of that Ilk, and the other Creditors of the Eſtate of *Langton*, Defenders,

TO THE

Petition of the deceaſt Sir *Alexander Cockburn* of *Langton*, in the Proceſs intented by him againſt the ſaid Creditors, and ſince his Deceaſe wakened and transferred by them againſt Sir *James Cockburn*.

ALTHO' the Anſwers already given in to this Petition do fully remove the Objections offered to the Lords Interlocutor, finding, that the Office of principal Uſher to the King veſted in this Family of *Langton* is adjudgable by the Creditors; yet, as conſiderable Diſcoveries have been made from the Records ſince theſe Anſwers were given in, the Creditors apprehend it may not be improper to point out to the Lords, as ſhortly as poſſible, ſome of the moſt material Things which have appeared upon this Search, with the natural Conſequences reſulting from them, which will entirely remove any Difficulty that has been ſtirred againſt the Interlocutor pronounced by the Court in this Caſe.

And that it may be the eaſier to the Lords to go through ſo large an Abſtract as they have been obliged to collect in the preſent Caſe, in order to conclude the Gentlemen on the other Side, who were pleaſed to conteſt every thing that was not proved clearer than Demonſtration, the Creditors have digeſted the whole Search, old and new, into as methodical an Order as poſſible, that the Lords may ſee, at one View, and without going through different Abſtracts, the whole Progreſs of the State of the Records with reſpect to this Subject, as far as the Creditors have been able to diſcover it.

The Concluſions of the Purſuer's Proceſs of Declarator are, *That it ſhould be found and declared, that this Office is not a patrimonial*

Eſtate that was alienable by his Predeceſſors, or affectable by their Creditors, but that it muſt deſcend to the Heirs of the Family in their Right of Blood; and that his taking and holding this Office cannot ſubject him to the Debts of his Predeceſſors.

In Oppoſition to theſe Concluſions, the Creditors apprehend it muſt appear to the Lords, 1*mo*, That this and other Offices of the like Nature are properly feudal and patrimonial Eſtates, and have the ſame Properties with other feudal and patrimonial Rights. 2*dly*, That, as ſuch, they deſcend to Heirs not by Right of Blood, but according to the Tenor of the Grant, and the Heir muſt make up a Title by Service, and conſequently cannot be veſted in the Office without being ſubjected to his Predeceſſor's Debts. And 3*dly*, That theſe Offices are tranſmiſſible from one Party to another, either by voluntary Conveyance, or by legal Diligence.

I. *That Offices are patrimonial Eſtates.* As to the *firſt* Point, That Offices of a much higher Nature than this in queſtion, have been by the immemorial Law and Cuſtom of this Nation, veſted in Subjects as proper feudal patrimonial Eſtates, is ſo evident from the Records, that it is hoped it will not be conteſted. It would be improper to trouble the Lords with reſuming the ſeveral Inſtances which appear from the Abſtract. There is no Character of a feudal Right but what we ſee applied to thoſe Offices: The Right is conſtituted by Inveſtiture, by Charter and Saſine; they have uniformly a Tenure and a Reddendo, ſometimes of Service, ſometimes in Money. The Charter grants to the Vaſſal not only the Office itſelf, but alſo the Fees, Profits and Emoluments of it, and uniformly diſpones both to him and his Heirs and Aſſignies. This appears to your Lordſhips from Numbers of Inſtances ſtated in the firſt Branch of the Abſtract, as well as many others which occur throughout the whole, tho' they are claſſed in other Branches for proving ſeparate Points: Inſtances, in which there can be no Ambiguity, or room for Cavil, as they are all of Charters granted of Offices *per ſe*, ſeparate and diſtinct from Lands; ſo that there is no Pretence to ſay that any of the above Particulars are inſert in the Charters with a View to Lands, but they muſt undoubtedly apply allenarly to the Office, and to Offices of a much greater Truſt and Power than that in queſtion, *e. gr.* Juſticiars Sheriff, Steward, Chamberlain, Admiral, *&c.* and from which conſequently the Argument proceeds much *à fortiori* to the preſent Caſe.

And as theſe Offices are a proper Fee, containing a Reddendo to the Superior, and the Profits of the Fee to the Vaſſal, ſo it appears by *Cap.* 3. and 4. of the Abſtract, that when the Vaſſal is not entred, the Profits go to the Superior according to the Nature of other Fees. The King's Officers are accountable for the Non-entry Duties of the Office, even

even when it is the ſole Fee conſtituted by the Inveſtiture, and has no Connection with Lands; and either the Non-entry Duties, or the Ward Duties, when ſuch is the Holding of the Office, are in uſe to be gifted by the Crown as a Caſuality of the Superiority of ſuch Feus, *Cap.* 4. and where the Ward and Marriage are taxed *in cumulo* by the Charter for Lands and Offices, when the Office comes to be alienated and diſjoined from the Lands, the Tax Duties are divided, and a proportional Part laid upon the Office, and the reſt upon the Lands, *Cap.* 12.

And it is upon the ſame Principles that the Wives of the Perſons inveſted in the Offices are entitled to a Terce of the Profits thereof, and ſometimes infeft in conjunct Fee with their Husbands, in the ſame Manner as in Feus of Lands, *Cap.* 10.

As alſo, that when the Office has been ſet in Tack, and the Tackſman forfeited, the Profits of the Office have been found to fall under his Eſcheat during the Term of the Tack, and gifted by his Majeſty accordingly, *Cap.* 14. No. 4.

But what muſt put an End to all Queſtion upon this Point is, that the Crown itſelf has held theſe Subjects to be *in commercio*, and has at ſundry Times been a Party in ſuch Commerce, as appears from *Cap.* XI. of which the firſt Inſtance is a Grant from the Crown, of the Chamberlainry of *Bute*, with the Salary annexed, to *James Stewart* heritably, in Feu Farm, in Conſideration of a certain Price paid by him, mentioned in the Charter.

And upon the other Hand, there are Numbers of Inſtances where heritable Offices have been purchaſed by the Crown from Subjects to whom they belonged, and ſometimes re-diſponed again by the Crown for Security of the Price until Payment; two of theſe Inſtances are mentioned in this ſame *Cap.* XI. one, of the Sheriffſhip of *Renfrew*, which was purchaſed by King *Charles* I. from *Hugh Sempil* of *Glaſsford*, who reſigned into the King's Hands *hæreditarium jus & officium vicecomitis vicecomitatûs de Renfrew, & balliatûs regalitatis de Paiſley, cum feodis, &c.* and the King was to give him, as the Value of theſe Offices, 3000 Acres of Ground in *Connaught* in *Ireland*, and to repone him to his Office until he was ſecured in that Poſſeſſion. *Hugh Sempil* conveyed the Benefit of this Bargain to *Bryce Sempil*, and the King agreed with him, in place of the 3000 Acres of Ground, to give him 5000 *l. Sterling* out of the Exchequer of *Ireland*, as the Price of theſe Offices; and in the mean time diſponed the Offices to *Bryce* in Liferent, and his eldeſt Son *James Sempil*, whom failing, to *Bryce*'s Heirs-male and Aſſignies, with Tenure and *Reddendo*, and a *Proviſo*, That the Infeftment of the Offices ſhould expire as ſoon as Payment ſhould be made of the 5000 *l.* And this *Bryce Sempil* and his Son af-

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terwards ſold theſe Offices to the Earl of *Eglinton*, to whom King *Charles* II. gave a Charter upon their Reſignation, declaring the ſame redeemable in Terms of the former Wadſet for the Sum of 5000 *l.*

And in like manner the Stewartry of *Anandale* was reſigned by the Earl of *Anandale* in the King's Hands for a Price agreed upon; but the Price not having been paid, the King granted him a Charter of the Office, with *Tenen.* and *Reddendo*, and redeemable upon Payment of the Price agreed upon, as in the former Caſe.

Many other Inſtances there are of the like Tranſactions made betwixt the Crown and Subjects poſſeſſed of Offices, particularly in the Reign of *Charles* I. which are notorious and well known; and therefore it is unneceſſary to lengthen this Paper by enumerating them.

Thus it appears, that Offices are in Law conſidered as feudal and patrimonial Rights, as well as Lands; there is no Property of a Feu, but what appears to be applied to them, and as they yield the Vaſſal a Profit and Revenue as other Subjects *in patrimonio*, ſo they are equally capable of Eſtimation at a Price, and accordingly have been made the Subject of Commerce even in Tranſactions with the Crown itſelf, as well as with Subjects.

Were Offices conſidered in Law to be of the ſame Nature with Peerages and Dignities, as the Purſuer lays down, it is evident that none of the above Characters could apply to them without the laſt Degree of Abſurdity. Let the Purſuer condeſcend upon any Inſtance where the Non-entry, Ward or Marriage Duties of a Dignity have been ſo much as mentioned in any Law-book, much leſs to be made the Subject of Grants paſt between the King and his Subjects; or where Wives have been found intitled to the Terce of the Fie of a Dignity. Let him give any Inſtance where Charters of Peerages or Dignities have been granted by the Crown in conſideration of a Price paid by the Peer; or where the Crown has purchaſed them back from the Peer at a Price agreed upon as the Eſtimation thereof; or *laſtly*, where the Crown has wadſetted or mortgaged a Peerage redeemable upon Payment of a certain Sum of Money.

If the Purſuer can produce Inſtances of this Kind, he may be allowed with ſome Colour to carry on his Parallel betwixt Offices and Dignities; but if theſe are Things that were never known in Law to be applicable to any Dignity whatſoever, and yet are every Day in the common Courſe of Law applied to Offices, though of greater Truſt and Importance than the preſent, it ought fairly to be admitted, that Offices are conſidered in Law as *patrimonial Rights*, though Dignities are not, but ſtill retain the Nature of *Privileges* inherent in the Perſon and Family on whom they are conferred. And this is truly no more than

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what is ſuppoſed in ſeveral Statutes, particularly the 44th Act of the 11th Parliament of *James* II. where the Legiſlature enacts, That no Office in Time to come be given *in Fie and Heritage*, well knowing, that by the common Law of *Scotland*, as well as of other Countries, Offices were properly granted in Fie and Heritage as well as Lands, and both equally veſted in the Subject as feudal, heritable and patrimonial Rights, which made it neceſſary to enact a Statute for reſtraining it in Time coming; and the ſame does alſo appear from the 42d Act, Parl. 11. *James* II. 60th Act, Parl. 14. *James* II. 26th Act, Parl. 5. *Ja.* III. and other Statutes which proceed upon the Suppoſal, That by the common Law Offices are granted in Fie and Heritage.

The Purſuer has been pleaſed to amuſe himſelf with a Notion, as if "an Inveſtiture in Offices intitled the Grantees to nothing but a Series "of Liferents, where each Incumbent's Right dies with himſelf, and "over which he has no more Power than a Liferenter has over a Sub-"ject liferented:" But beſides that this Notion is repugnant to the Senſe of the Legiſlature, who paſt the above Statutes, and appear to have had no Doubt that Offices might by the common Law be granted *in feodo & hæreditate*, it is alſo repugnant to the Senſe, in which the Crown the Author of thoſe Grants, has in all Ages underſtood them. Were ſuch Rights no other than Liferents, or unalienable Rights in the Perſon of the Grantees, How could the Crown have made any of the Tranſactions already mentioned? or who would have adviſed the Crown to pay great Sums of Money for the Reſignation of an Office, when by the common Law the Reſigner had no Power to diſpoſe of it, but the next Subſtitutes muſt notwithſtanding have ſtill been intitled to the Office? and yet in all Ages theſe Tranſactions have been underſtood to be valid and effectual. Beſides the Inſtances already mentioned in ancient Times, a much later one is obſerved in the Abſtract, *Cap.* XIII. where the Duke of *Lennox* reſigned the Office of Admiralty, with the Bailliary of the Regality of *Glaſgow*, into the Hands of her Majeſty Queen *Anne*, which was never doubted to be an effectual Reſignation, and yet it could be of no Avail upon the Principles maintained by the Purſuer.

II. *That Titles muſt be made up to Offices by Service and Retour.*

The *next* Point which appears with great Evidence from the Search that has been made into the Records, is, That the Title to be made up to theſe Offices is by Service and Retour. This is a Point with Reſpect to which the Purſuer has found it neceſſary to inſert a Concluſion in his Declarator, "That the Office muſt deſcend to the Heirs of the "Family in their Right of Blood, and that his taking and holding the "Office cannot ſubject him to his Predeceſſor's Debts." And indeed it is evident that this Point of itſelf is deciſive of the whole Queſtion be-

twixt the Parties; for if the Purſuer cannot take this Office without ſerving Heir to his Predeceſſors, and repreſenting them in their Debts and Deeds, he has no Title to enter into the Queſtion, Whether the Office is adjudgeable or not? He has no Title to claim the Office until he ſerves Heir, and pays the Debts of his Predeceſſors whom he repreſents by ſuch Service, and if he is ready to do that, the Creditors will have no Intereſt to diſpute with him upon the Effect of their Adjudications.

And therefore, throughout the whole of this Debate, the Purſuers have been at great Pains to maintain this Point, That Offices are tranſmitted without Service. This is ſtrongly averred in the Purſuers Informations, " That a Service and Retour can never be requiſite for ma-
" king up the Heir's Title in a Dignity or Office, unleſs where annex-
" ed to Lands. That with regard to Dignities and Offices, the Caſe
" with us at preſent comes to be pretty much on the ſame Footing with
" what has always been the Law of *France*, Lands not excepted; that
" *mortuus ſaſit vivum*, which in plain *Engliſh* is, That the Heir is
" intitled to take up his Predeceſſor's Right at Short-hand, without
" needing a Renovation of the Feu from the Superior." And the ſame Doctrine runs through the Purſuer's Petition now depending, in which it is inſiſted, " That although Services to Offices may appear, where
" they are contained in the ſame Charters and Infeftments of the Lands,
" which is owing to the Careleſsneſs of the Writer, in throwing into
" the Service whatever he finds in the Predeceſſor's Infeftment; yet
" there is no Neceſſity of an Entry by Service, in order to take up ei-
" ther a Title of Honour or an heritable Office; that the actual Exer-
" ciſe thereof by the Heir admitted or accepted of by the Sovereign, is
" all the Entry that is neceſſary to ſuch Offices, and the Petitioner can
" obſerve no Inſtance of a Service uſed, where nothing was intended
" to be taken up but an Office or a Dignity."

But the Error of theſe Aſſertions ſtands proved by this Search, it is hoped, to the Purſuer's own Conviction: As it appeared from Numbers of Inſtances excerpted from the Records, and given in before the Report, that the uſual and uniform Practice was to retour Heirs in Offices as well as Lands, where both was contained in the ſame Infeftment; ſo it appears by this After-ſearch, that where the Predeceſſor was poſſeſſed of no Lands, but only of an heritable Office, yet ſtill the Titles to theſe Offices have always been made up by Services and Retours, in the ſame Way as to any other heritable Subject. Of this ſeveral Inſtances are mentioned in the Abſtract, *Cap.* II. XV. and XVIII. where Heirs have been retoured to heritable Offices *per ſe*, diſtinct from Lands; and it is no Wonder that more have not as yet been diſcovered, conſi-

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ſidering how rare a Caſe it muſt be, that one will die poſſeſſed of an heritable Office, who has no other Subject whatever belonging to him that can be taken up by his Heir; however, as it appears, as far as can be diſcovered from the Records, that in every Caſe where Offices have belonged heritably to a Defunct, whether ſeparately *per ſe*, or in the ſame Infeftment with Lands, the Title has conſtantly been made up by Service and Retour; and the Purſuer has not been able to condeſcend upon any Inſtance to the contrary. This muſt be held the univerſal Practice of the Nation; eſpecially as every Conſideration that can be brought from the Analogy of Law tends to confirm and ſupport it.

For beſides that the Preſumption lies until the contrary is proved, that whenever a Subject is given *in feodo & hereditate*, the Title will be made up from the Dead to the Living in the ſame Manner as in other Subjects that are ſo poſſeſſed. Your Lordſhips have obſerved, that the Sheriffs are bound to account for the Non-entry Duties of heritable Offices, and that even *per ſe*, and diſtinct from Lands; that Gifts of Ward and Non-entry of ſuch Offices have been uſually granted, and theſe Non-entry Duties declared to belong to the King, and to the Donatar, until the lawful Entry of the righteous Heir, which could only be by Service, Retour and Infeftment. How theſe things can be reconciled with the Purſuer's Hypotheſis, that Offices are fully veſted in the Heir by Right of Blood, without Service or Entry, we muſt confeſs we cannot comprehend.

And had not ſuch Service been neceſſary to make up a Title to theſe Offices, how is it poſſible that any Heir would have allowed his Predeceſſor's Creditors to carry them off from him by Adjudications *cognitionis cauſa*, where he could not venture to ſerve Heir and repreſent his Predeceſſor? Had no Service been neceſſary, he could renounce to be Heir, and yet claim the Office, as deſcending to him by Right of Blood, and not liable to be adjudged for his Predeceſſor's Debts; and yet your Lordſhips obſerve, that Numbers of ſuch Adjudications have been led of Offices upon the Renunciation of the apparent Heir, and Charters granted by the Crown to Creditors upon them. Abſtract, *legal Titles, cap.* 5.

Were the Purſuer's Doctrine true, that Offices are taken up by Right of Blood without Service, it is ſtrange that this ſhould have been hitherto a Secret to the whole Nation; that in all thoſe various Inſtances, where Offices have been carried off from apparent Heirs for their Predeceſſors Debts, none of them ſhould ever have been adviſed to plead; that he had a Title to the Office without Service, and that tho' he renounced to be Heir, yet the Office was his, and could not be carried off by the Diligence of his Predeceſſor's Creditors. So general an Acquieſcence

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quieſcence of the Nation in a Point agreeable to the Analogy of Law, is a ſtronger Confirmation of it than could be had from repeated Deciſions given to that Purpoſe.

In Caſes of this Nature, 'tis certain, That the Common Law is founded upon Cuſtom; we have no Statute pointing out the Form of connecting Titles from the Dead to the Living; Services and Retours were neceſſary in Lands, long before Mention was made of them in any Statute; the Statutes ſuppoſe this to have been the Law, becauſe ſuch was the univerſal Practice of the Nation; and if the Cuſtom has been equally univerſal in *Offices* as in *Lands*, and both the Crown and the Subjects have in all Ages proceeded upon the Suppoſal of the Neceſſity of it; it is equally abſurd to ſuppoſe, that *mortuus ſaſit vivum* in the one Caſe, as in the other, ſince we have the ſame Evidence to the contrary in both Caſes, *viz.* the general Conſuetude of the Nation, which is the Source and Standard of the Law in all thoſe Matters, which have taken their Riſe from Cuſtom, and not from Statute.

And therefore, as there appears no Ground to maintain that the Purſuer can have any Right to this Office, until he make up a Title to it by Service and Retour, as all his Predeceſſors have done before him, as well as every other Subject who has at any Time been poſſeſſed of heritable Offices; the Purſuer fails in the firſt Step of his Declarator, that he can take the Office without being liable to his Predeceſſor's Creditors. And he has no Title to object to the Diligence of the Creditors, unleſs he can condeſcend upon any Law that intitles an Heir to ſerve to his Predeceſſors, and at the ſame Time to diſpute the Payment of their Debts.

III. *That Offices may be conveyed,*

But though this of itſelf is ſufficient to exclude the Purſuer's Plea; yet the Creditors ſhall go on to the *third* Point, in which they doubt not to give your Lordſhips full Satisfaction, *viz.* That this Office is tranſmiſſible, either by *voluntary Deeds* or *legal Diligence*.

by voluntary Deeds.

With reſpect to the *firſt*, the Tenor of the Grant would ſeem of itſelf to be ſufficient to determine the Point in favours of the Defenders, as it is expreſly granted to Heirs and Aſſignies, and that not only where the Office is contained in the ſame Charter with the Lands, but where the Office is granted *per ſe*: So that the Power of aſſigning can by no Conſtruction be applied to any other Subject, but to the Office itſelf.

But in order to remove all Pretence for Cavil in this Caſe, the Creditors have laid before the Lords Multitudes of Inſtances from the Records, which muſt give full Conviction, that at all Times it has been underſtood both by the Crown and by the Nation, That heritable Offices ſo granted, were alienable by the Proprietor as much as any other Part of his Property.

In *Cap.* V. the Lords will obſerve a Number of Inſtances, where heritable Offices have been conveyed by the Proprietors, and Charters granted by the Crown upon their Reſignation. And in *Cap.* VI. there are a great many further Inſtances where Charters of Offices have been granted by Subjects *titulo venditionis*, for a Price paid to the Granter, and theſe Charters confirmed and approven of by the Crown, as rightly and properly granted.

And the laſt four Branches of this firſt Part, *viz. cap.* XV, XVI, XVII, and XVIII. do exhibite the Progreſs of ſundry Offices, which appear to be very nearly allied to the Office in queſtion, *viz.* the Uſher of the King's Exchequer, King's Serjand or Macer, Door-keeper of the King's Chapel, and Keeper of the King's Park of *Holy-rood-houſe*, all of which have been from Time to Time ſold and transferred to a Variety of Perſons, and the Purchaſers univerſally received and admitted by the Crown: And it ſeems impoſſible to figure any Argument that can be urged againſt the Tranſmiſſion of the Office in queſtion, but what muſt apply with equal Force againſt the Tranſmiſſion of all the above Offices; and conſequently muſt ſtrike down the Right of the preſent Poſſeſſors, though they have remained for Ages ſecure in Poſſeſſion of theſe Offices, as much as of any other Part of their Property.

One ſhould think there would need no further Evidence to ſatisfy all the World of the Meaning of a Grant; when it not only expreſly gives a Power to aſſign, but the Granter, upon all Occaſions acknowledges this Power, by receiving Purchaſers from the Grantees, as ſoon as offered to him, and granting them Charters either of Reſignation or Confirmation, according to the Form in which the Sale has been made by the Vaſſal: But here there is yet further Evidence of the Meaning of thoſe Grants; for when the Crown does not intend that the Office ſhould be alienated, the Grants are *limited* to the Grantees and the Heirs of their Bodies, with a Proviſo of *Return* to the Crown upon their Failure, as may be ſeen from ſeveral Inſtances in *Cap.* VII.

Nay ſometimes Care is taken to ſecure againſt Alienations, when intended by the Crown to be reſtrained, by *irritant* and *reſolutive* Clauſes, as is done in the Charter of the Offices of Sheriff and Coroner of *Dumfries*, *Cap.* VIII. which is confined to the Grantee, and the Heirs of his Body; and declares, That *nullius usûs erat alicui aliæ perſonæ virtute emptionis, venditionis, appretiationis, & ullius juris cujuſcunque*; and that in caſe of any Alienation or Appriſing, the Offices ſhall revert to the Crown, and the Infeftment ſhall be *ipſo facto* void: And the like Irritancies are ſometimes inſert in Charters from Subjects, to ſecure the Return of the Office to the Granter, failing Iſſue of the Grantee, and the Charter confirmed by the Crown, *Cap.* VIII.

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What Uſe could there be for theſe Precautions, if Offices were, from the Nature of the Grants, and the common Law Rights, unalienable, & *quæ inhærent oſſibus* of the Family to which they are granted? Is not this anxious Clauſe a virtual Admiſſion on the Part of the Crown, that by Law the Office would have been tranſmiſſible, either *virtute emptionis*, *venditionis* or *appretiationis*, if ſuch Tranſmiſſion had not been by this Clauſe expreſly prohibited and diſcharged? It is extreamly evident, that either the Crown, the Author of all Offices, and thoſe who have adviſed the Crown, as well as the Subjects on whom the Offices were conferred, have in all Ages been miſtaken of the Nature of theſe Grants; or otherwiſe that this new Doctrine broached by the Purſuer is void of all Foundation.

And to trouble the Lords with no more upon this Point, it is alſo obſervable, That as it has never been doubted that a Fiar of an Office might diſpoſe of it as of his other Eſtate, unleſs he is reſtained, and accordingly they have been in uſe to provide their Wives in Liferents thereof, as well as to exerce every other Act of Property thereanent: So on the other Hand, where an Office has been granted to a Father in Liferent, and a Son in Fee, and it was intended that the Father ſhould have the ſame Power of Alienation that he would have had by Law, if named Fiar, Care is taken to provide for this by a Clauſe in the Charter, reſerving Power to the Liferenter, without the Fiar's Conſent to *ſell*, *diſpone* and *impignorate* the *Office*, and exerciſe all Acts of Property competent to a Fiar, *Cap.* IX.

It was ſuggeſted in Behalf of the Purſuer, "That where the Charters of Reſignation were granted directly by the King, the Right of the new Officier did not depend upon the Deed of the Reſigner, further than to make the Office vaik, but depended ſolely upon the Grant of the Crown, who has Power to diſpoſe of the vacant Office, and where the Charters proceeded upon Reſignations made in Exchequer, the Purſuer inſiſted, That ſuch Grants were abſolutely void, and, upon Trial, behoved to be ſet aſide.

But theſe are ſtrange Difficulties, to which the Purſuer is driven by controverting Points, that are eſtabliſhed by the common Law and univerſal Practice of the Nation. If the Reſigner has no Power to convey the Office, but the Charter of Reſignation is only to be ſuſtained as a new Grant, then not only the Charters granted in Exchequer are void, but alſo the Charters granted by the King himſelf, becauſe after the Statute of *James* II. the King could not grant Offices in Fie and Heritage: And ſo if the Purſuer's Doctrine take place, and theſe Offices are not tranſmiſſible by the Fiars, the whole Charters of Reſignation, Confirmation, Appriſing and Adjudication, that have been granted by the

Crown

Crown during the Courſe of Ages, as valid Titles, are good for nothing: And the Conſequence of this again muſt be, that not One of Ten of the preſent Poſſeſſors can be found to have any Title to the Offices they poſſeſs, becauſe the Bulk of them poſſeſs upon ſuch ſingular Titles, which by this new Doctrine, till now undiſcovered by the Nation, muſt all be declared void.

But it is evident this whole Scheme of the Purſuer's is directly contrary to the Meaning of the Crown, the Granter of theſe Charters, which is nowiſe to confer a vacant Office, but to tranſmit an Office to a Purchaſer, from one who had Power to diſpoſe of it; and accordingly Charters are granted in Courſe, not only upon Reſignations, but when the Subject poſſeſt of the Office diſpoſes of it by Charter, the Crown approves of the Diſpoſal, and that not of Choice and Favour, but of Right. No Man, with his Eyes open, can imagine, that the Crown in theſe Caſes is conferring a *vacant Office*; it is plainly no other than a *Renewal* of the *Feu* to thoſe who by Law have Right to claim it.

Or by legal Diligence.

The Creditors believe it is unneceſſary to enlarge further upon this Point, and ſhall in the next Place proceed to conſider the Tranſmiſſion of theſe Offices *by legal Diligence*, which was at firſt wholly denied on the Part of the Purſuer. And after ſome Inſtances of Appriſings were recovered by the Creditors in the former Search, the Purſuer was pleaſed to inſiſt, "That theſe Inſtances afforded a ſtrong Argument in "his Favours; that as they amounted to no more than half a Dozen, "it is a ſtrong Evidence, that in all Ages it has been the eſtabliſhed O-"pinion, that heritable Offices are not adjudgeable."

But it is believed, after conſidering the Abſtract now given in, that the *Reverſe* of this *Propoſition* will be found to be true, and that in all Ages it has been held undoubted, that Offices were affectable by the legal Diligence of Creditors, as much as any other Part of their Debitor's Property.

From Abſtract of legal Titles.

For your Lordſhips will obſerve from that Part of the Abſtract, which ſtates the *legal Titles* made up to *Offices*, that this appears to have been the conſtant Senſe of the King, of his Courts, and of the Nation, as far back as we have any Light from the Records, down to this Day. That in the Year 1510, before the College of Juſtice was eſtabliſhed, and when the King's *daily Council* was the ſupreme Court of the Nation, a Debitor poſſeſſed of Lands and Offices, in virtue of a Charter from the King, having refuſed to take Infeftment upon the Charter, in virtue of the King's Letters directed to that Purpoſe, to the end his Creditor might have Acceſs to appriſe the ſame in Terms of the Statute 1469, the King adviſed with the Lords of the Council what was proper to be done

CAP. I.

done to execute the Law. The Advice they gave, and which his Majesty followed was, To enter the Creditor as his Vassal in certain Lands and Offices therein mentioned, belonging to the Debitor, *virtute acti nostri Parliamenti super debitis confect.* and under a Regress to the Debitor, in case of Payment of the Debt within seven Years, *juxta tenorem dicti acti Parliamenti.* Here it is plain, the King is not disposing of these Offices out of his own Choice to the Creditor rather than the Debitor, or preferring one Officer or Servant to another, *ex delectu personarum*, as the Pursuer would construct the Renewals of Grants to import; but he is acting a Ministerial Part in the Execution of the Law, betwixt one of his Subjects and another; he is advising with his Courts, of the proper Method incumbent on him, as Superior, to execute the Law. And they declare, that by the Statute made in the preceeding Reign, for giving Execution to Creditors against their Debitor's Estate, the King is bound to enter the Creditor as his Vassal in the Debitor's Lands and Offices, under Redemption, as provided by the Statute. Here is then a Declaration of the King and his Council, that Grants of Offices extend to the Grantee's Creditors, and that they are liable to be appriſed for his Debts, as much as any other Part of his Estate, *Abstract*, Legal Titles, *Cap.* I.

CAP. II. And as this was the Notion the King and his Courts entertained of the Nature of these Grants, and of their being subjected to the Law, allowing Execution to Creditors for their Debts, in the first Cases of the Kind which occurred after the Law was made; so by the Sequel of this Abstract it appears to have continued firm and unshaken down to this Day. The Pursuer pretended, that any Instances which would appear of Appriſings of Offices must have past by Inadvertence, and without Enquiry. But it is impossible any Mortal can believe this, who looks into the Records. By several Instances in *Cap.* II. it appears, that before General Appriſings were introduced into Practice, and while the Form laid down in the Statute 1469 was still in Observance, the Practice was to appriſe Offices, and put a particular Value upon them, and the Sheriff adjudged to the Creditor the Offices, with as much of the Lands as corresponded to the Debt, in Terms of the Act of Parliament. This your Lordships observe to have been done in the Office of Baillie and Keeper of the Hospital of *Kilhays*, of the Sheriffship of *Dumbarton*, which was so appriſed from the Earl of *Lennox*; of the Constabulary of *Strowie*, &c. And in all these Cases the King grants a Charter to the Appriſer of the Offices and Lands appriſed, not *ex proprio motu*, and from a Choice to exchange the one Office for the other, but in Obedience to the Law; for so all the Charters run: *Nos igitur acta nostri Parliamenti perimpleri, debitæque executioni demandari volentes*,

volentes, dedimus & conceſſimus, &c. And as this is no more than the *debita legis executio*, ſo the Form of the Law is ſtrictly and exactly obſerved, and a Regreſs provided to the Debitor, in caſe he clear his Debt within the ſeven Years limited by the Statute.

Theſe Things will not admit of the Purſuer's Gloſs, to any Perſon who is not wilfully blinded; and as little can the Crowd of Inſtances which follow in the next *Cap.* 3. of general *Appriſings* and *Adjudications* of *Offices*, ſometimes alongſt with Lands, and ſometimes *per ſe*, as far back as general Appriſings are to be found of Lands down to this Time. And in Conſequence of theſe Appriſings, the King has uniformly been in uſe to grant Charters to the Appriſers and Adjudgers, and to inveſt them, as his Vaſſals, in the Offices, in Obedience to the Act of Parliament. CAP. III.

And as this has been the conſtant and uninterrupted Practice during the Time when the Law took Place, ſo in the Time of *Oliver Cromwel*'s Uſurpation, when moſt of the Juriſdictions in *Scotland* were aboliſhed; yet as the Fees of the Offices ſtill remained with the Proprietors, it never entred into any body's Mind to doubt that in as far as there remained any Acceſſion or Emolument of theſe Offices with the Debitor, the Law would transfer the ſame to his Creditors, and put them in his Place: And accordingly the Lords will obſerve in *Cap.* IV. ſeveral Inſtances where the Judges then in Being did, in virtue of Decreets of Appriſing, convey to the Creditors the Fees and Emoluments pertaining to the Offices which had been veſted in their Debitor. CAP. IV.

Thus it appears, that *Offices*, or when ſuppreſſed, their *Fees* and *Perquiſites*, were never omitted in Adjudications deduced during the Life of the Debitor; and in like manner, where Adjudications have been led of Eſtates belonging to Defuncts upon Decreets, *cognitionis cauſa*, in theſe Caſes alſo the Offices have been uniformly adjudged along with the Eſtates, as appears from the Inſtances collected in *Cap.* V. And upon Applications from the Adjudger, the Lords of Seſſion have always been in uſe to iſſue Warrants to the Directors of the Chancery to infeft him on his Adjudication, by Precepts under the Quarter Seal, in the Offices as well as the Lands to be holden of his Majeſty, in like manner as the Debitor held the ſame. CAP. V.

And as the Law has always received Execution in Favours of Creditors againſt the Offices belonging to their Debitor, from his Majeſty and his Courts, according to the ſeveral Forms in which the Law directed the Diligence to proceed in the reſpective Periods; ſo when, by Statute in the Year 1681, judicial Sales were introduced of the Eſtates of bankrupt Debitors, this Law, as well as the former, has been always conſtructed to extend to Offices as a Part of the Heritage belonging to CAP. VI.

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the Debitor, and ſuch Offices have been judicially ſold by the Authority of the Court of Seſſion, in all Caſes where Offices were diſcovered to belong to ſuch Debitors, and affected by the Creditors Diligence, as appears by the Inſtances collected in *Cap.* VI. of *Legal Titles*.

After going through the Evidence which appears from the Records, there will be no need of much Argument to ſatisfy your Lordſhips, that we have all the Evidence in this Caſe of the Points now conteſted with us, *viz.* " That *Offices* muſt be *veſted* in *Heirs* by *Service*, and may " be *tranſmitted* to *ſingular Succeſſors*, either by *voluntary* or *legal* " Titles," that can be had of the common Law of this or any other Country. The conſtant, univerſal, uninterrupted Conſuetude of the Nation, as ancient as Offices, Infeftments and Diligences have been known; approved of by our Kings, by their Councils, by their Courts; acquieſced in and relied on by the People, who univerſally made up their Titles in that Manner, paid Non-entry Duties duly to the King as long as they neglected it, entred into Contracts for the Purchaſe of thoſe Rights, lent their Money to the Poſſeſſors upon the Faith of them, and had thoſe Purchaſes always confirmed without Objection, and Execution awarded for Payment of their Debts againſt theſe Rights by the Authority of the King and his Courts. If ſuch inveterate Cuſtom, *quæ ſemper & ubique obſervata fuit*, is not able to aſcertain and determine the Nature of a Right, the Defenders do not know any Thing that can.——If the Lieges have no Reaſon to rely upon thoſe Parts of our Law which have been held indiſputable for a Courſe of Ages, What Reaſon can they have to rely upon ſuch as have been thought doubtful and uncertain, and at laſt determined by Judgments perhaps after a Variety of Opinions in the Judges? Theſe Points cannot ſurely be reckoned ſo much fixed as the other, and if both are to be thrown aſide as uncertain, there is an End of our Common Law; there is nothing certain but a few Points determined by Statutes, and how few theſe are, and how lame our Law would be if reduced within that Compaſs, is too obvious to be inſiſted on. The important Rules upon which the Succeſſion and Tranſmiſſion of our moſt valuable Rights depend, are aſcertained by Cuſtom only; and if that eſſential Part of our Law ſhall be overturned, or the Authority of it ſhaken, there is no Man in the Nation can ſleep ſecure, or have any Certainty that he may not be ſtript of his Property when he leaſt ſuſpects it.

From STATUTES. And as this Evidence which is brought of the Common Law, would of itſelf be ſufficient to ſupport the Point eſtabliſhed by the Interlocutor, and, in the Reſpondents Apprehenſion, invincible; they can further add, That where ever the Legiſlature have taken theſe Matters under their Conſideration, they appear uniformly to have been of the ſame Opi-

Opinion, That Offices are by Law patrimonial Eſtates, deſcendable and alienable as other Rights of Property. The Statutes 42 and 44, Parliament 1455, Act 60, Parl. 1457, Act 26, Parl. 1469, have been already mentioned, from all which it appears the Legiſlature underſtood that Offices may be effectually granted *in feodo & hæreditate*; and from this all the other Conſequences follow with Reſpect to the Tranſmiſſion to Heirs and ſingular Succeſſors, unleſs the Law has made ſome Exception, of which the Reſpondents have ſeen no Inſinuation in any Statute or Law-book.

The Act 1587, *Cap.* XXIX. which annexes the Temporality of Benefices to the Crown, takes care that thoſe who have Right to heritable Offices, ſuch as Bailliaries and Stewartries, ſhall not be prejudged by the Annexation, and declares, "That the ſaid heritable Baillies and "Stewards, and their *Heirs* and *Succeſſors*, ſhall now and hereafter "abide and remain in their Right and Title which they have of the "ſaid Offices, except in the Change of their Superior in our Sovereign "Lord and his Succeſſors, who in all Time thereafter ſhall be their im-"mediate Superior." And the like ſaving Clauſe is repeated in the Act 13th, Parl. 1633, concerning Regalities of Erections.

And in like manner, in the Year 1617, when King *James* VI. appears to have had it at Heart to have the heritable Juriſdictions of Sheriffs, Stewards, *&c.* brought under the Power of the Crown, an Act of Parliament was paſt authoriſing certain Perſons to deal with the Proprietors to ſurrender theſe Offices to the Crown upon a proper Equivalent: A Copy of the Act is inſert in the Abſtract, *Page* 59, 60, and it plainly enough appears, that the Legiſlature ſtill remained of the ſame Sentiments declared in former Statutes, That theſe Offices were Rights of Inheritance belonging to the Proprietors, and that the Proprietor for the Time might diſpoſe of them in ſuch Terms as he ſhould think proper; and accordingly, upon the Plan of this Act, many of theſe Offices were ſold by the Proprietors, and purchaſed by the Crown for great Sums of Money.

And although Encroachments have at ſome Times been made upon thoſe as well as other Rights of Property, as particularly by the Act 1681, *Cap.* XVIII. which declares, That notwithſtanding of heritable Offices and Juriſdictions beſtowed by the Crown, there ſtill remains with it a cumulative Juriſdiction, yet theſe have afterwards been declared to be Grievances and illegal Encroachments, as this Act was by the Act 13th and 18th of the Meeting of the Eſtates in the Year 1689; and as ſuch was afterwards repealed by the 28th Act, Parl. 1690, and thoſe who had been turned out of their Offices on ſuch Pretences have been reponed *per modum juſtitiæ*, as appears from Inſtances ſtated in the Abſtract,

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Page 61: And the Legiſlature has thought proper to except ſuch Rights to the Proprietors, even in Regulations made with Reſpect to the publick Policy of the Kingdom, Act 39th, Parl. 1693: And to inſert an expreſs Article in the *Treaty* of *Union* itſelf, *reſerving* them to the Owners *as Rights of Property*.

And indeed it is impoſſible to doubt of the Sentiments of the Legiſlature on this Head, when one looks at the Multitude of Inſtances collected in the Abſtract of Acts of Parliament, ratifying and approving of Grants of *Offices* made to *Heirs* and *Aſſignies*: Theſe Acts have been applied for from time to time, in order to obviate any Objection to which the Grants might be liable, either from the Statutes 1455, forbidding Offices to be given in Fie and Heritage without Conſent of Parliament; or from the Acts of Annexation, or other Laws from which an Objection might ariſe: But we ſee they uniformly agree in this, that the Grants thereby approven of are to *Aſſignies* as well as to *Heirs*; that this is conſidered as the ordinary and proper Tenure of the Grants of Offices when given in Fie and Heritage, and approven of as ſuch by the Legiſlature. So the Act in favours of the Earl of *Rothes*, *No.* 1. *Page* 53. finds the Charters and Infeftments of the Lands and Offices therein mentioned to the Earl and his Heirs and Aſſignies, to be *well and orderly given and proceeded*. The Act in favours of the Earl of *Dunbar*, *No.* 6. ordains a Charter to be made, giving and granting, and diſponing heritably, and perpetually confirming to the ſaid *George* Earl of *Dunbar*, and his Heirs and Aſſignies, *&c.* And indeed the whole of the Acts referred to in the Liſt, as the Lords will obſerve from peruſing it, do either authoriſe or confirm Grants ſometimes of Lands and Offices, ſometimes of Offices *per ſe*, to the Grantee and his Heirs and Aſſignies, or to his Heirs-male or of Tailzie, and his Aſſignies whatſoever, according to the reſpective Deſtinations in which they were conceived.

Page 53, 54, 55, 56, 57, 58 *and* 59.

Theſe Clauſes will admit of no Conſtruction but one, That the Grantee had Power to diſpoſe of the Office, and when ever there offers any Occaſion, they are ſo explained in the Acts: For Inſtance, the Act in favours of Sir *James Murray* in the Year 1701, *No.* 30. ratifies the Charter to Sir *James* himſelf *in Liferent*, and *John Murray* his Son, *&c.* reſerving a Power to Sir *James to ſell and diſpoſe of* the Subjects therein contained; that is, giving the ſame Power to him the *Liferenter* only, that he would have had if *Fiar* by the Nature of the Grant. And the Act ratifying the Charter to Colonel *Paul Symer* and his Heirs, Succeſſors and Aſſignies, of the Office of Mayor of Fie of the Sheriffdom of *Aberdeen*, with Lands thereto belonging, recites, "That the ſaid Office and Lands formerly belonged to Mr. *Alexan-*

" *der Biſſet*, &c. and thereafter became in his Majeſty's Hands, as " laſt Heir, through Want of Heirs, &c. who might ſucceed to him in " the ſaid Office and Lands, *or any lawful Diſpoſition made by the* " *ſaid* Alexander *in his own Lifetime*, &c."

The Reſpondents apprehend, that, after conſidering theſe Things, it is not poſſible to doubt, that the Legiſlature have in all Ages had the ſame Senſe of the Nature of thoſe Grants, which the Courts of Juſtice and the Nation appear alſo to have had, That they were properly patrimonial and alienable, as much as other Subjects *in patrimonio*; that this Power belonged to the Fiar in conſequence of the Grant to Aſſignies, and was expreſly provided to the Liferenter when ſuch was intended to be reſerved to him; that the Crown could not diſpoſe of the Office even upon the Failure of the laſt Fiar without Heirs, if he had during his Life granted a Diſpoſition thereof to a third Party. After ſo great Authorities, there is the leſs Occaſion to enquire into the Opinions of private Lawyers; nor is it to be expected much will be found upon a Matter of this Kind, which paſt every Day before their Eyes, before every Jury, and before every Court, and which it never entred into any one's Mind to call in queſtion. Such are not the Subjects of which Law-books generally treat; and yet, in ſo far as they have Occaſion to mention it, their Opinions are all on one Side.

From LAW-BOOKS.

Sir *Thomas Craig*'s Opinion has been formerly mentioned on this Point, in the laſt Title of his Book he gives the Hiſtory of Juriſdictions by the feudal Law, and how they came in Progreſs of Time to be heritable, or *hæreditaria*, and to paſs along with Feus; and in his Title *De licitatione*, § 15. he expreſly lays it down as one of the Conſequences of Offices becoming hereditary, That they may be ſold for the Debts of the Proprietor; and in this he diſtinguiſhes hereditary Offices from ſuch as are granted for Life only. The Authority was tranſcribed in the principal Anſwers, and the Reply made by the Purſuer was, " That there is no ſolid Diſtinction betwixt heritable and Life-" rent Offices; that the Heir in a feudal Holding takes nothing by his " Predeceſſor, and an heritable Office can be conſidered in no other " Light than as a Series of Liferents, over which the preſent Poſſeſſor " has no Power."

Craig.

But, with great Submiſſion, the Diſtinction is obvious and ſolid. When an Office is granted for Life only, a *delectus perſonæ* may be preſumed, as much as when granted for a Term of Years; but the Suppoſal of a *delectus* is abſurd, where an Office is veſted as a *jus hæreditarium*. There may be yet more *delectus* in ſingular Succeſſors than in Heirs, where the Fitneſs of the Perſon who is to ſucceed muſt depend entirely upon Chance; and conſequently when a Right is ſo veſted, it

can admit of no other Conſtruction but a Right of Property, and therefore muſt be ſubjected to the Rules which govern ſuch Rights, of which a principal one is, That every Right veſted in the Debitor may be affected by his Creditors for Payment of their Debts. This is a Rule laid down in all the Law-books, *That Appriſings extend to all heritable Rights, though not provided to Aſſignies, but to the Debitor and his Heirs only.* So Lord *Stair* lays it down, *Lib.* 3. *Tit.* 2. § 14. and refers to other Authors. Sir *Thomas Craig* applies it to the very Subject in queſtion, and in this is followed by Preſident *Spottiſwood*, who inſerts his Opinion as agreeable to Law, in his *Practicks*, Page 49. Sir *George Mackenzie* is alſo clearly of the ſame Opinion in his *Criminals*, Title *Regalities*, § 4. where he makes it a Queſtion if the King can erect Regalities within the Bounds of heritable Sheriffſhips; becauſe, ſays he, he would *thereby evacuate the Office of Sheriffſhip, though bought with real Money.* So that the Point now conteſted ſeems not to have been hitherto doubted by any Lawyer who has taken it under Conſideration.

Stair.

Spottiſwood.

Sir George Mackenzie.

From LAWS of other Countries.

Nor is this Part of our Conſtitution any wiſe ſingular or peculiar to the Laws of this Country, we believe it has taken place in all Countries where the feudal Law prevailed. In *England* there is no Doubt that many Offices have been granted as Eſtates of Inheritance, and that the Perſons veſted in ſuch Offices had the Power of Diſpoſal, nor did the Legiſlature itſelf think it juſt to encroach upon ſuch Rights. Though a Statute was made in the 5th and 6th of *Edward* VI. forbidding the Sale of certain Offices under Penalties, yet Care is taken to inſert an Exception with reſpect to heritable Offices in theſe Words, "Provided al- "ways, That this Act, or any Thing therein contained, ſhall not in "any wiſe extend to any Office or Offices, whereof any Perſon or "Perſons is or ſhall be ſeaſed of any Eſtate of Inheritance."

And as this Right of Diſpoſal of heritable Offices is thus admitted and ſaved by the Law, ſo, as far as the Defenders are informed, it has never been made a Doubt: But when Queſtions have occurred which depended upon it, they have always been determined upon the Suppoſal that ſuch is the Law. Thus it has occurred to be controverted, whether, when a Houſe or Land belongs to an Office, and the Office is granted by Deed, if the Houſe and Land follows as an Incident or Acceſſory without Livery? And it was found to go as an Acceſſory, Sir *John Vaughan*'s *Reports*, Page 178. *Coke*'s *Inſtit. 1ſt Part, p.* 49. It has alſo been queſtioned, whether, as Offices in Fie are excepted from the Statute, if Demiſes of ſuch Offices will fall within the Exception? and it was found they did, *Levinz*'s *Reports*, 27. *Carol.* II. *Ellis verſus Ruddle, p.* 151. And ſo in other Caſes Queſtions have been

2. Lev. Rep. 151.

been agitated and determined, which ſuppoſed, that the Law allowed Offices in Fie to be diſpoſed of by the Proprietors, but no Queſtion ever made that ſuch was the Law.

And that the Law of *France* allows of the Diſpoſal of Offices is equally notorious: It is true this is reſtrained as to ſome Offices, particulary the Great Officers of the Crown: But as to the far greateſt Part of ordinary Offices they are every Day affected by the Diligence of Creditors, and ſold by the Decrees of the Courts for Payment of Debts, as is plain from their Law Books, and particularly from *Loyſeau*'s Treatiſe upon Offices, where he lays down the Rules obſerved in ſuch Sales, and the Preference given to Creditors upon the Price, according to the different Forms of their Securities and Diligence.

And in like manner the Lawyers of other Countries take it for granted, that Offices and Juriſdictions are *in commercio*; that they may be given by the Proprietor to another in Liferent; that when they are granted to Heirs they may deſcend to Women, *etſi officium virile, quatenus fœmina hæres id per ſubſtitutum adminiſtrari gerique curare poterit.* Voet. *De uſufructu*, § 27. *De muner. et honor.* § 2. Vinnius, *In inſtit. de uſufructu in princ.* & § 2.

The Purſuer did not inſiſt upon any Law or Authority in Oppoſition to the univerſal Practice ſet forth by the Defenders, but argued, mainly from a ſuppoſed Incongruity in the paſſing of Offices to Aſſignies or Creditors, "That Offices and Juriſdictions were granted to Families *Objection.*
"becauſe of their Weight and Intereſt to ſupport the ſame, and preſerve
"the Peace of the Country, and not intended to be taken up by a
"mean Perſon who may happen to lend a ſmall Sum to the Heir of the
"Family; far leſs is it practicable they can be divided amongſt a Num-
"ber of Creditors who may adjudge *pari paſſu* for Payment of their
"ſeveral Debts."

But theſe Inconveniences are purely imaginary, and would lie as ſtrong on the other Side. If Offices are conferred on Families becauſe of their Intereſt and Property in a Country, they ought to follow the Property, and not remain with the Family after the Property goes from it. When they are allowed to deſcend to Heirs, there can be no particular untransferrable Truſt or *delectus perſonæ* in the Caſe, nor any good Reaſon why they may not be transferred by ſingular Titles; and if there is any Unfitneſs in the Acquirer, which may alſo happen in the Heir, it can be ſupplied by the Nomination of a proper Perſon to exerce for the Time, which the Laws of all Countries allow of. Several Inſtances were mentioned in the former Anſwers, where this has been done in *England*; and with us there is a particular Statute authoriſing it, *Ja.* I. *Parl.* 1. *Cap.* 6.

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And as to the Case of several Adjudgers, *pari passu*, there occurs no more Difficulty in this than in other indivisible Subjects, such as Superiorities, Patronages, &c. which yet are certainly liable to the Diligence of Creditors; and in reality there is no Difficulty at all: For the first effectual Adjudger is the Officer received by the Crown, and consequently is the Person entitled to exerce the Office: Nor would it vary the Case tho' the other Adjudger had a joint Title, for then the Matter might be easily extricated by appointing a Delegate, as in the Case of natural Incapacity above observed. And, at any rate, an Argument *ab incommodo* can be of little Weight against what appears to be the immemorial Constitution of a Country, when it is an Inconvenience arising only from a late Regulation introduced in the Year 1661, and which, because it was found inconvenient even to divide Lands, the ordinary Subjects of that Diligence, and impracticable to divide other Subjects that fall under it, was therefore soon after remedied by another Expedient, *viz.* a judicial Sale of the Debitor's Estate. This removes the whole Inconvenience suggested, which, as it lasted but for a few Years, can create no just Objection to what appears to be founded in the general Plan of the Law, that Offices, as well as other indivisible Rights, are liable to be affected by the Diligence of Creditors.

The Defenders hope the Lords will forgive the Trouble of this additional Paper, as the Case is of great Importance to them. They were willing to explain the Discoveries that have been made from the Records since the former Answers were given in; but with respect to the State and Progress of the Office now in question they shall entirely refer to their former Answers and Abstract relative to this Office, by which it appears that it is established as a feudal Right by Charter and Infeftment, devised sometimes to Heirs of Line and Assignies, at other times to Heirs of Tailzie, and last of all to Heirs Male and Assignies, taken up by these Heirs either upon Resignation or by Service and Retour: That Liferents of this Office were given to Strangers, and these Grants approven of by the Crown: That Grants OF THIS OFFICE *PER SE*, and Fees thereto annexed, were devised to Heirs and Assignies, and *ratified* by *Act of Parliament*: That in Consequence thereof Sir *William Cockburn* the Defender obtained a Right to this Office, and has been received and admitted by Charter from the Crown about 57 Years ago; and your Lordships, by a Judgment *in foro*, have preferred him thereto, and he has accordingly possest the same, and has uplifted the Fees and Emoluments thereof beyond the Years of Prescription without any Challenge or Interruption.

It is obvious therefore, that the Defender's Right to the Office in Question, stands yet in a stronger Light than many of the Instances a-

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bove mentioned, which have hitherto been held to be unexceptionable, and that the ingenious Arguments and Objections thrown out by the Purſuer from ſuppoſed Difficulties and Inconveniencies, which may occur in other Caſes, are truly foreign to the preſent Queſtion, and cannot properly apply to the Rights veſted in the Defenders by Conveyances from the Proprietor, in conſequence of Powers derived to him and his Predeceſſors, by ſo many repeated Grants from the Crown, ratified by Act of Parliament. And ſtill leſs, when the Titles whereby the Defenders have denuded the former Proprietor of this Office, have been ſo many Years ago ratified, and confirmed by the Crown.

And therefore to conclude, As it is apparent from what has been laid before the Lords, that if the Novelty broached by this Proceſs were to meet with Succeſs, not only the Defenders, but moſt of the other Proprietors of heritable Offices within the Kingdom behoved to be ſtript of valuable Branches of their Property, of which they have hitherto believed themſelves ſecure: That the Tranſactions of Parties for many Ages paſt, ratified by King and Parliament, and relied upon by the Nation, muſt alſo be overturned, and rendred void: And, *laſtly*, That the inveterate Cuſtom, which makes the Common Law of this Country, behoved as to this Article to be pulled up by the Roots: And the Notions which have been entertained of it by our Lawyers, by our Courts, by the Legiſlature itſelf, to be inverted: The Defenders cannot have any Apprehenſion, that a Doctrine attended with ſuch Conſequences will ever be hearkned to by the Lords, but are perſwaded they will diſcourage all ſuch Attempts for the future, by adhering to their former Interlocutor.

In reſpect whereof, &c.

JA. FERGUSON.